UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRIC KILKENNY, Plaintiff, v. GREENBERG TRAURIG, LLP and MORGAN STANLEY, INC., YVONNE TRIMARCHI and KAREN MORITA, Defendants.	CIVIL ACTION NO. 05 CV 6578 (NRB)

MORGAN STANLEY'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11

BRESSLER, AMERY & ROSS
A Professional Corporation
17 State Street
New York, New York 10004
(212) 425-9300
Attorneys for Defendant
Morgan Stanley DW, Inc.

On the Brief:

J. Michael Riordan

748246_2

Dockets.Justia.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

STANDARD OF REVIEW 4

POINT I

PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED AS PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AS AGAINST MORGAN STANLEY 5

POINT II

NO EMPLOYER-EMPLOYEE RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND MORGAN STANLEY; THEREFORE, ALL OF PLAINTIFF'S CLAIMS, INCLUDING PURSUANT TO TITLE VII, THE ADEA, THE NEW YORK STATE HUMAN RIGHTS LAW AND THE NEW YORK CITY HUMAN RIGHTS LAW SHOULD BE DISMISSED 6

A. In Addition To Plaintiff's Failure To Exhaust His Administrative Remedies As To Morgan Stanley, Morgan Stanley Was Not Plaintiff's Employer; Therefore, Additional Bases Exist To Dismiss Plaintiff's Amended Complaint, As Analyzed Below. 6

B. Plaintiff Has Not Sufficiently Alleged That A Joint Employer Or Integrated Employer Relationship Existed Between Morgan Stanley and Greenberg Traurig. 6

POINT III

SEVERAL OF PLAINTIFF'S CLAIMS AGAINST MORGAN STANLEY SHOULD BE DISMISSED AS THE ALLEGATIONS ARE NOT DIRECTED AT MORGAN STANLEY 8

A. Plaintiff's Libel and Slander Claims Must Be Dismissed As Plaintiff Does Not Allege That Any Morgan Stanley Employee Made Any Defamatory Remarks. 8

B. Plaintiff's Claim of an ERISA Violation Fails As Morgan Stanley Did Not Provide or Control His Retirement Benefits 9

C. Plaintiff's Claims Under the New York State General Obligations Law and Common Law Do Not Pertain To Morgan Stanley and, Therefore, Should Be Dismissed. 9

D. Plaintiff's Claim Under the Equal Pay Act Does Not Pertain To Morgan Stanley and, Therefore, Should Be Dismissed. 9

E. Plaintiff's Claim Under the New York Executive Law Does Not Pertain To Morgan Stanley and, Therefore, Should Be Dismissed. 10

F. Plaintiff's Claim of Negligent Misrepresentation Does Not Pertain to Morgan Stanley and, Therefore, Should Be Dismissed. 10

POINT IV

PLAINTIFF'S CIVIL CONSPIRACY CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW 10

A. Plaintiff's Civil Conspiracy Claim Fails As Plaintiff Has Failed To Allege Sufficiently An Underlying Tort. 10

B. Plaintiff's Civil Conspiracy Claim Fails As The Elements of A Conspiracy Are Not Met. 11

POINT V

SANCTIONS ARE APPROPRIATE IN THIS CASE SINCE PLAINTIFF'S CLAIMS AGAINST MORGAN STANLEY ARE FRIVILOUS AND VEXATIOUS 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases:

Arculeo v. On-Site Sales & Mktg., LLC,
321 F. Supp. 2d 604 (S.D.N.Y. 2004) 7, 8

Belgrave v. Pena,
254 F.3d 384 (2d Cir. 2001) 5

Caisse Nationale de Credit Agricole-CNCA, New York Branch v. Valcorp.,
28 F.3d 259 (2d Cir.1994) 12

Clinton's Ditch Coop. Co. v. NLRB,
778 F.2d 132 (2d Cir. 1985) 7

Design Strategies, Inc. v. Davis,
2005 WL 1944659, *21 (S.D.N.Y. 2005) 10, 11

Fox Industries, Inc. v. Gurovich,
2005 WL 2133595, *6 (E.D.N.Y. 2005) 12

Gilmore v. Univ. of Rochester Strong Mem'l. Hosp. Div.,
2005 WL 2105788, *3 (W.D.N.Y. 2005) 5

Hawkins v. City of New York,
2005 WL 1861855, *18 (S.D.N.Y. 2005) 8

Laurin v. Pokoik,
2004 WL 513999, * 8 (S.D.N.Y. 2004) 7

Legnani v. Alitalia Linee Aeree Italiane, S.P.A.,
274 F.3d 683 (2d Cir. 2001) 5

Maduakolam v. Columbia Univ.,
866 F.2d 53 (2d Cir.1989) 12

Malley v. New York City Bd. of Educ.,
207 F.Supp. 2d 256 (S.D.N.Y. 2002) 12, 13

Papason v. Allain,
478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) 4

Rivera v. Puerto Rican Home Attendants Serv., Inc.,
922 F. Supp. 943 (S.D.N.Y. 1996) 7

Safe-Strap Co., Inc. v. Koala Corp.,
270 F. Supp.2d 407 (S.D.N.Y. 2003) 4

Truong v. American Bible Soc'y.,
367 F.Supp.2d 525 (S.D.N.Y. 2005) 8, 9

York v. Assoc. of the Bar of the City of New York,
286 F.3d 122 (2d Cir. 2002) 6

Zeising v. Kelly,
152 F. Supp.2d 335 (S.D.N.Y. 2001) 4

Statutes and Rules:

Fed. R. Civ. P. 11 .... 1, 2, 3, 12, 13

Fed. R. Civ. P. 12 3

29 U.S.C. §§ 621, et seq. 5

29 U.S.C. § 623 6

42 U.S.C. §§ 2000e, et seq. 5, 6

McKinney's Executive Law § 296 6

PRELIMINARY STATEMENT

This matter is now before the Court on motion by Defendant Morgan Stanley DW, Inc. ("Morgan Stanley") to dismiss Plaintiff's Amended Complaint and to seek sanctions against Plaintiff for instituting and maintaining the frivolous claims against Morgan Stanley.

Plaintiff's Amended Complaint asserts claims against his employer, Defendant Greenberg Traurig, and Morgan Stanley alleging age discrimination in violation of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the New York State Human Rights Law and the New York City Human Rights Law. Additionally, Plaintiff alleges violations of ERISA, the New York Executive Law, the Equal Pay Act, the torts of negligent supervision and negligent misrepresentation and conspiracy to commit certain of the foregoing alleged unlawful acts.

All of these claims are frivolous as against Morgan Stanley. Morgan Stanley was neither Plaintiff's employer nor did any "joint employer" or "integrated employer" relationship exist between Greenberg Traurig and Morgan Stanley. Indeed, Plaintiff's allegations and his Charge to the Equal Employment Opportunity Commission ("EEOC"), which only named Greenberg Traurig as his employer, establish that Greenberg Traurig – not Morgan Stanley – was his employer. In addition to Plaintiff's Charge establishing Greenberg Traurig as his employer, Plaintiff's failure to name Morgan Stanley in the Charge is an independent basis to dismiss his claims against Morgan Stanley. For these and other reasons analyzed infra, all of Plaintiff's claims against Morgan Stanley should be dismissed.

Additionally, Morgan Stanley has served notice upon Plaintiff, pursuant to Fed. R. Civ. P. 11, that if he continued to pursue his claims against Morgan Stanley, the

Company would seek sanctions. Nevertheless, Plaintiff has refused to dismiss his claims against Morgan Stanley. Accordingly, upon dismissal of Plaintiff's Amended Complaint against Morgan Stanley, a sanction should be imposed upon Plaintiff pursuant to Rule 11 compelling him to pay Morgan Stanley all its attorneys' fees and costs.

PROCEDURAL HISTORY

On July 20, 2005, Plaintiff filed his original Complaint, and on August 8, 2005, Plaintiff filed his "Amended Complaint." After an exchange of correspondence between Plaintiff and counsel for Morgan Stanley, Plaintiff refused to grant unconditionally Morgan Stanley's request for a thirty-day extension to Answer or otherwise move. Consequently, Morgan Stanley filed a motion with the Court on August 23, 2005 seeking a thirty-day extension. On August 24, 2005, Plaintiff opposed Morgan Stanley's extension request and also sought to transfer this matter from the Foley Square vicinage to the White Plains vicinage. On August 25, 2005, this Court granted Morgan Stanley's request for a thirty-day extension (until September 28, 2005) and denied Plaintiff's request to transfer venue. Additionally, on August 25, 2005, Morgan Stanley advised Plaintiff that if he continued to pursue this matter against Morgan Stanley, then Morgan Stanley would seek sanctions pursuant to Fed. R. Civ. P. 11 ("Rule 11"). On September 28, 2005, Morgan Stanley filed and served the within motion. [1]

---

[1] Defendant Morgan Stanley is moving to dismiss all Plaintiff's claims against the Company. Morgan Stanley reserves all other legal and factual defenses not asserted herein and Morgan Stanley will include all such defenses in its Answer which will be filed if this motion is not granted in full. Fed. R. Civ. P. 12(a)(3)(B)(4)(A).

STANDARD OF REVIEW

A motion to dismiss should be granted to dismiss "claims that are plainly meritless." Safe-Strap Co., Inc. v. Koala Corp., 270 F. Supp. 2d 407, 416 (S.D.N.Y. 2003) (internal citations and quotations omitted). "[S]uch a motion is intended to weed out meritless claims, avoiding needless efforts on the parts of the parties and the court and avoiding needless discovery." Zeising v. Kelly, 152 F. Supp. 2d 335, 343 (S.D.N.Y. 2001). Importantly, in ruling on a motion to dismiss, the Court should not assume that a plaintiff can prove facts not alleged. Papason v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

POINT I

PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED AS PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AS AGAINST MORGAN STANLEY

Federal statutory and case law are well established: a plaintiff may only bring suit in Federal Court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq, ("Title VII"), or the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq, ("ADEA"), if the plaintiff has properly exhausted his administrative remedies and obtained a right-to-sue letter from the EEOC. Legnani v. Alitalia Linee Aeree Italiane, S.P.A., 274 F.3d 683, 686 (2d Cir. 2001); Belgrave v. Pena, 254 F.3d 384, 386 (2d Cir. 2001). Here, despite Plaintiff's assertion that he "complied with all statutory prerequisites to his federal claims," (see Amended Complaint, ¶ 5), he clearly has not exhausted any administrative remedies as against Morgan Stanley. Plaintiff has attached as Exhibit A to the Amended Complaint, his right-to-sue letter from the EEOC. Notably, this letter only names co-Defendant Greenberg Traurig – not Morgan Stanley. Consequently, Plaintiff has failed to meet the statutory requirement of exhausting his administrative remedies as against Morgan Stanley. Legnani, 274 F.3d at 686; Gilmore v. Univ. of Rochester Strong Mem'l. Hosp. Div., 2005 WL 2105788, *3 (W.D.N.Y. 2005). For that reason alone, Plaintiff's claims against Morgan Stanley under Title VII and the ADEA should be dismissed.

POINT II

NO EMPLOYER-EMPLOYEE RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND MORGAN STANLEY; THEREFORE, ALL OF PLAINTIFF'S CLAIMS, INCLUDING PURSUANT TO TITLE VII, THE ADEA, THE NEW YORK STATE HUMAN RIGHTS LAW AND THE NEW YORK CITY HUMAN RIGHTS LAW SHOULD BE DISMISSED

A. In Addition To Plaintiff's Failure To Exhaust His Administrative Remedies As To Morgan Stanley, Morgan Stanley Was Not Plaintiff's Employer; Therefore, Additional Bases Exist To Dismiss Plaintiff's Amended Complaint, As Analyzed Below.

An employer-employee relationship is required to sustain claims under Title VII, the ADEA, the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"). 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623(a)(1); McKinney's Executive Law § 296(a); York v. Assoc. of the Bar of the City of New York, 286 F.3d 122 (2d Cir. 2002). Here, Plaintiff has admitted in his Amended Complaint and EEOC Charge that Greenberg Traurig (not Morgan Stanley) employed him. See Amended Complaint, ¶¶ 2, 3. Plaintiff's admission that Greenberg Traurig was his employer is fatal to these statutory employment claims against Morgan Stanley. Accordingly, Plaintiff's claims against Morgan Stanley pursuant to Title VII, the ADEA, the NYSHRL and NYCHRL should be dismissed.

B. Plaintiff Has Not Sufficiently Alleged That A Joint Employer Or Integrated Employer Relationship Existed Between Morgan Stanley and Greenberg Traurig.

In an effort to avoid dismissal, Plaintiff argues that Morgan Stanley and Greenberg Traurig constituted a "joint employer" or "integrated employer" relationship. However, Plaintiff cannot sustain his burden to establish such a relationship.

Two entities are only considered "joint employers" when they have "chosen to handle certain aspects of their employer-employee relationships jointly." Clinton's Ditch Coop. Co. v. NLRB, 778 F.2d 132, 137 (2d Cir. 1985). This analysis is used to apply the term "employer" functionally and to incorporate persons who "control some aspect of an employee's compensation or terms, conditions, or privileges of employment." Laurin v. Pokoik, 2004 WL 513999, * 8 (S.D.N.Y. 2004). The joint employer analysis specifically looks at "commonality of hiring, firing, discipline, pay, insurance, records and supervision." Arculeo v. On-Site Sales & Mktg., LLC, 321 F. Supp. 2d 604, 608 (S.D.N.Y. 2004). A joint employer relationship exists only where one party "had immediate control over another company's employee[ ]." Rivera v. Puerto Rican Home Attendants Serv., Inc., 922 F. Supp. 943, 949 (S.D.N.Y. 1996).

Here, Plaintiff has not alleged and cannot allege sufficient facts to state a claim that Morgan Stanley and Greenberg Traurig were "joint employers." Plaintiff does not allege that both entities shared the responsibilities of his "hiring, firing, discipline, pay, insurance, records and supervision." See Arculeo, supra. Rather, Plaintiff merely alleges, in conclusory fashion, that Morgan Stanley "controlled" his work performance, his time and expense and directed his work. See Amended Complaint, ¶¶ 12-13. Not surprisingly, the only specific allegations involve Greenberg Traurig. See Amended Complaint, ¶¶ 22-60. In these allegations – located in the "Factual History" section – Plaintiff admits that Greenberg Traurig controlled the terms of Plaintiff' employment, including his hiring, firing, discipline, pay, records and supervision. Id. Indeed, later on in his Amended Complaint, Plaintiff expressly admits that his employment relationship and the terms thereof were controlled by Greenberg Traurig – not Morgan Stanley. Id.

¶¶ 92-93. These admissions, coupled with the fact that Plaintiff has not alleged – and cannot allege or prove – that Morgan Stanley ever hired Plaintiff, paid him a salary, or provided him benefits, are fatal to any joint employer claim. See Arculeo, supra.

For all the foregoing reasons, Plaintiff's claims against Morgan Stanley pursuant to Title VII, the ADEA, the NYSHRL and the NYCHRL should be dismissed.

POINT III

SEVERAL OF PLAINTIFF'S CLAIMS AGAINST MORGAN STANLEY SHOULD BE DISMISSED AS THE ALLEGATIONS ARE NOT DIRECTED AT MORGAN STANLEY

A. Plaintiff's Libel and Slander Claims Must Be Dismissed As Plaintiff Does Not Allege That Any Morgan Stanley Employee Made Any Defamatory Remarks.

To establish a cause of action for defamation, libel or slander, Plaintiff must allege and ultimately prove: "(1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence in the unprivileged publication; and (4) the statement must be defamatory per se or it must have caused special harm." Hawkins v. City of New York, 2005 WL 1861855, *18 (S.D.N.Y. 2005) (citing Restatement 2d (Torts) § 558). To satisfy the third element, it is also necessary to allege fault or malice. Fault or malice is sufficiently alleged if the plaintiff alleges "defendant had 'common law' malice, or ill will, toward plaintiff[ ]." Truong v. American Bible Soc'y., 367 F.Supp.2d 525, 529 (S.D.N.Y. 2005) (internal citations omitted).

Plaintiff's claims of libel and slander against Morgan Stanley should be dismissed for two reasons. First, Plaintiff has not alleged that Morgan Stanley made any allegedly false or defamatory statement. See Hawkins, supra. Rather, the allegations focus on the individual Greenberg Defendants, Trimarchi and Morita's purported statements. See Amended Complaint, ¶¶ 72-77. Second, Plaintiff has failed to plead sufficiently the third element as he has not alleged that Morgan Stanley had "common law malice, or ill will, toward" him. See Truong, supra. Accordingly, Plaintiff's claims against Morgan Stanley of libel and slander should be dismissed.

B. Plaintiff's Claim of an ERISA Violation Fails As Morgan Stanley Did Not Provide or Control His Retirement Benefits.

Plaintiff alleges that his employment was terminated so as to avoid paying him retirement and other benefits. See Amended Complaint, ¶¶ 88-90. Plaintiff's allegations make clear that Greenberg Traurig employed Plaintiff (id. ¶ 23); therefore, Plaintiff must look to Greenberg Traurig – not Morgan Stanley – for any alleged retirement benefits. Accordingly, Plaintiff's claim against Morgan Stanley of an ERISA violation should be dismissed.

C. Plaintiff's Claims Under the New York State General Obligations Law and Common Law Do Not Pertain To Morgan Stanley and, Therefore, Should Be Dismissed.

These claims allege that Morgan Stanley benefited from a "quantum meruit contract" with Plaintiff and breached duties arising therefrom through its discriminatory acts. See Amended Complaint, ¶¶ 91-99. However, the Amended Complaint only alleges that Greenberg Traurig and the individual Greenberg Defendants committed discriminatory acts. Id. Accordingly, Plaintiff's claims against Morgan Stanley under the New York State General Obligations Law and common law should be dismissed.

D. Plaintiff's Claim Under the Equal Pay Act Does Not Pertain To Morgan Stanley and, Therefore, Should Be Dismissed.

This claim alleges that the Equal Pay Act was violated as employees were paid differently based on gender. See Amended Complaint, ¶¶ 110-112. However, Plaintiff only names Greenberg Traurig employees as those who were paid differently based on their gender. As previously established, Plaintiff has not alleged that Morgan Stanley paid Plaintiff his salary or benefits or engaged in discriminatory pay practices. Accordingly, Plaintiff's claim against Morgan Stanley under the Equal Pay Act should be dismissed.

E. Plaintiff's Claim Under the New York Executive Law Does Not Pertain To Morgan Stanley and, Therefore, Should Be Dismissed.

This claim only makes allegations against individual Defendants Trimarchi and Morita. See Amended Complaint, ¶¶ 107-109. No allegations are asserted against Morgan Stanley. Accordingly, Plaintiff's claim against Morgan Stanley under the New York Executive Law should be dismissed.

F. Plaintiff's Claim of Negligent Misrepresentation Does Not Pertain to Morgan Stanley and, Therefore, Should Be Dismissed.

This claim makes the general allegation that "Defendants" gave false information in an employment reference. See id., ¶¶ 113-116. However, the Amended Complaint only names the individual Greenberg Traurig Defendants as those who made the alleged misrepresentations. Accordingly, Plaintiff's negligent representation claim against Morgan Stanley should be dismissed.

POINT IV

PLAINTIFF'S CIVIL CONSPIRACY CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW

A. Plaintiff's Civil Conspiracy Claim Fails As Plaintiff Has Failed To Allege Sufficiently An Underlying Tort.

Plaintiff's claim of civil conspiracy fails as a matter of law because such a claim requires that Plaintiff establish an underlying primary tort. Design Strategies, Inc. v.

Davis, 2005 WL 1944659, *21 (S.D.N.Y. 2005). Here, apparently Plaintiff is alleging that Morgan Stanley and Greenberg Traurig conspired to violate Plaintiff's "rights under United States Law." Amended Complaint, ¶85. As previously explained, Plaintiff's claims pursuant to Title VII, the ADEA, NYSHRL and NYCHRL fail as Plaintiff did not exhaust administrative remedies vis-à-vis Morgan Stanley and did not establish an employer-employee or joint employer relationship. The claim of conspiracy fails, as a matter of law, because the independent tort of conspiracy is not recognized absent an underlying tort. Here, since no underlying tort is alleged against Morgan Stanley, the civil conspiracy claim against Morgan Stanley should be dismissed. See Design Strategies, supra.

B. Plaintiff's Civil Conspiracy Claim Fails As The Elements of A Conspiracy Are Not Met.

A civil conspiracy claim requires, inter alia, an overt act in furtherance of the agreement. Id. Here, as previously established (including by Plaintiff's admission), Morgan Stanley was not Plaintiff's employer; therefore, Morgan Stanley lacked the authority to commit the alleged overt act of terminating Plaintiff's employment because of his age. As such, this element of the claim is absent. Accordingly, Plaintiff's claim against Morgan Stanley of civil conspiracy should be dismissed.

POINT V

SANCTIONS ARE APPROPRIATE IN THIS CASE SINCE PLAINTIFF'S CLAIMS AGAINST MORGAN STANLEY ARE FRIVILOUS AND VEXATIOUS

Sanctions are appropriate under Fed. R. Civ. P. 11 ("Rule 11") if a pleading is signed for an improper purpose such as "to delay or needlessly increase the cost of litigation, or does so without a belief, formed after reasonable inquiry, that the position espoused is factually supportable and is warranted by existing law or a non-frivolous argument for the extension, modification, or reversal of existing law." Caisse Nationale de Credit Agricole-CNCA, New York Branch v. Valcorp., 28 F.3d 259, 264 (2d Cir.1994). When a district court determines that Rule 11 has been violated, it may impose both monetary and non-monetary sanctions, which include attorneys' fees. Fed. R. Civ. P. 11(c); Fox Industries, Inc. v. Gurovich, 2005 WL 2133595, *6 (E.D.N.Y. 2005). Importantly, Rule 11 applies to both attorneys and pro se litigants to guard against frivolous, vexatious or scurrilous lawsuits. Maduakolam v. Columbia Univ., 866 F.2d 53, 56 (2d Cir.1989). Indeed, the fact that a litigant appears pro se "does not shield him from Rule 11 sanctions because one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." Malley v. New York City Bd. of Educ., 207 F.Supp. 2d 256, 258 (S.D.N.Y. 2002) (internal citations and quotations omitted).

Plaintiff's claims against Morgan Stanley are frivolous. On August 25, 2005, Morgan Stanley advised Plaintiff why his claims against Morgan Stanley were baseless: Morgan Stanley was not Plaintiff's employer; it had no control over Plaintiff's employment, salary, benefits or terms of employment; and it did not engage in any unlawful conduct. See pp. 6-8, supra. Accordingly, pursuant to Rule 11, Morgan Stanley advised that if Plaintiff continued to pursue this litigation against Morgan Stanley, the Company would seek sanctions pursuant to Rule 11. See Exhibit A to the Affidavit of J. Michael Riordan. Plaintiff has continued to pursue this matter and is now "clog[ing] the judicial machinery with meritless litigation." See Malley, supra. Accordingly, Plaintiff should be sanctioned for knowingly pursuing frivolous claims against Morgan Stanley.

CONCLUSION

For all the foregoing reasons, Defendant Morgan Stanley respectfully submits that Plaintiff's claims against Morgan Stanley should be dismissed with prejudice and that Plaintiff should be ordered, as a sanction for continuing to pursue the frivolous and vexatious claims against Morgan Stanley, to pay all Morgan Stanley's fees and costs incurred in connection with the defense of Plaintiff's claims.

BRESSLER, AMERY & ROSS, P.C.
Attorneys for Defendant
Morgan Stanley DW, Inc.

By: ______________________
J. Michael Riordan

Dated: September 28, 2005